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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA,

Petitioner,

vs.

MARIE BALLENTINE, as Guardian of the Estate of
Stephen William Ballentine,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This brief is in reply both to the brief of respondent and the memorandum filed by the Solicitor General for the Register of Copyrights as amicus curiae.

POINT I

**RESPONDENT HAS MISCONSTRUED THE EFFECT OF
THE LEGISLATIVE HISTORY OF § 24 OF THE 1909 COPY-
RIGHT ACT.**

Respondent has failed to give effect to the fact that Congress in 1870 when it revised the Act of 1831 changed the word "and" to "or" and deleted the phrase "either or all then living". Obviously some reason must be attributed to the fact that the language was materially changed. The only logical conclusion that can be drawn therefrom is that in 1870 Congress intended to grant to the widow exclusive rights to renewals accruing during her lifetime.

Respondent further argues that the above noted deletions are of no moment and supports this assertion (Res. Br. pp. 56-17) by reference to portions of a report of the Committee on Patents in the Congressional Globe of the 41st Congress, 2d Session, Part 3 at pp. 2680 and 2854. A complete examination of this report as found in the Congressional Globe shows clearly that substantial changes were included in the proposed act. To illustrate this we quote from the report of the Committee on Patents from page 2680 of the Congressional Globe which immediately follows that portion of the report quoted in respondent's brief at page 16:

"In prospect of this proposed revision the Committee on Patents had already received numerous communications from those interested in the subject, and also numerous bills and petitions that had been filed in the House and referred to that committee, *proposing various amendments to the existing laws.* They had taken all these into consideration and invited the presence of persons interested in the different subjects to which the amendments were intended to apply, and encouraged discussion from those interested and from those learned in this branch of the laws upon those proposed amendments. *They were heard at great length, and the committee were very careful to give a hearing, either orally or by written communication, to any and every person who supposed that there were defects in the existing laws which ought to be remedied, or who could make plain and clear the practice under the laws so as to secure more perfectly the rights which these laws were intended to protect.* The result of all these hearings and discussions has been the adoption by the committee of certain propositions of amendment to these laws, which they have embodied in the bill now before the House.

The bill is so printed as to show the law exactly as it now is, in the form in which it came from the hands of the commissioners of revision. Every provision which is now in force has been printed at

length in the bill, although it is proposed to strike out by way of amendment many of them. All those which it is proposed to strike out are printed, and the amendments, *many of which are substitutes for the parts proposed to be omitted*, are also printed separately, and in italics, *so that they may be clearly distinguished from the law as it now is*. The House, therefore, now have before them in the reported bill the exact state of the law, those provisions of the law which it is recommended shall be dropped, and of the new provisions which shall be substituted in their place, and also of the minor amendments which are proposed to different parts of the bill. It can be seen, therefore, at once what has been the law, what is the law, in what respects the existing law is supposed to be defective, how that defect is proposed to be amended, and how the law will read if the amendment should be adopted." (Emphasis added)

POINT II

PETITIONER'S INTERPRETATION OF THE WORDS "WIDOW OR CHILDREN" IS SUSTAINED BY LOGIC AND AUTHORITY.

The briefs submitted in this case show that no one prior to 1944 urged that a widow must share with children the renewal rights which she secured in her deceased husband's works during her lifetime. In 1944, the law had been in effect for 35 years. In the meantime the leading textwriters had affirmed the widow's priority. (See pp. 9-10 and footnote 2, p. 10 of brief of Motion Picture Association of America, Inc., *amicus curiae*.)

It is significant that of the six commentators cited by respondent as sustaining its interpretation of "widow or children" (Res. Br. pp. 20-23), two were written after the decision of the court of appeals in this case and all were written subsequent to 1943.

Respondent has not finished its quotation from Chafée, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 527 (1945) and has thereby sought to cast a meaning upon the language entirely different from that intended by the author. The full quotation from Chafée reads as follows:

"Do the widow and children of a dead author take successively or as a united group? The Copyright Rules and Regulations treat them as all on the same step, *but I have seen no case in point.*" (Emphasis added to indicate matter omitted by respondent)

Petitioner cannot explain why there was a sudden questioning of earlier opinions in certain quarters after 1943 except for the clue in the brief submitted by the Register of Copyrights. He annexes a letter written in 1944 by Mr. Richard C. DeWolf, then Acting Register of Copyrights, to Ligon Johnson, Esq., in which he states "the [Copyright] Office has never felt that the matter was clear enough to justify taking the position that a child could not renew so long as the widow was living. Our policy, as you know, is to register the renewal in the name of any beneficiary who seems reasonably entitled and leave the apportionment of interests among various beneficiaries to be settled by them or by a court if need should arise." (Register of Copyrights' Brief, pp. 27-28).

Inasmuch as this is the earliest suggestion anywhere that children might challenge the ownership of renewal rights by their widowed mother, we asked the Register of Copyrights upon receipt of the Register's brief to furnish a copy of Mr. Ligon Johnson's letter which prompted this reply—particularly since Mr. Johnson had been an active participant in the hearings and legislation relating to the United States Copyright Act of 1909, The British Copyright Act of 1911 and The Canadian Copyright Act of 1921.

Mr. Johnson's letter, here made public for the first time, states the views then universally prevailing among authors and their attorneys as follows:

April 19, 1944

Mr. Richard C. DeWolf
Acting Register of Copyrights
Washington, D. C.

Dear Mr. DeWolf:

I had a somewhat interesting question raised today and wonder if the Copyright Office has any rule or custom which might afford a precedent.

The question was as to construction of the provisions of Section 23 as to renewal rights of a widow, widower or child.

I know it was the intent of the Patents Committee to vest renewal rights in the order named, that is if the author was survived by a widow, the widow had the right of renewal and the renewal copyright vested in her, if there was no widow, then the right vested in the children, if no children, the executor and if no executor in the next of kin. The punctuation of the section appears to bear this out, this intent and construction and I think it is the intent of the Act. There have been decisions in general terms that the rights descended in the order specified, but no specific holding on this exact point.

Any other construction would bring endless confusion. Suppose there was a widow and a half dozen minor children, and the widow renewed. If the children had joint rights with the widow, the widow could not convey or license, and to get any conveyance or license under the renewal a guardian would have to be appointed for each of the children.

Again, where the children were of age, instead of the widow having the right to convey, the widow and children would be tenants in common and while none could alone convey any exclusive right each might convey non exclusive rights as against the others, so that as many non-exclusive rights might

be conveyed as there were widow and children and the rights hopelessly messed up. There would necessarily be a complete check up of survivors of the author under each renewal, which would often be impossible.

And still again, under such a construction what rights would the widow renewing have in the copyright or returns from the renewal rights? If there are six children does she hold one seventh of the copyright or what? Must each child be paid one seventh of the proceeds, and who would be liable if one or more are unpaid?

Has the Copyright Office any rule or custom with the widow applying, where there are known children, and is the widow told that the copyright renewal should be taken out in the name of the widow and all the children and not merely by the widow alone.

I know in the past, the generally accepted construction has been that when a widow survives and renews the renewed copyright vests in her, under which she could make any necessary license or conveyance, and only the widow executed such contracts.

One of the motion picture attorneys, at this late day, has asserted that the commas, in the Act were meaningless and the 'or' meant 'and', and to secure any valid assignment or license under a widows renewal it was necessary to ascertain if there were children, and if so require that each child should join in the contract, with the money jointly paid.

I would be greatly obliged if you would advise me if there were any Copyright Office rules, regulations or customs that would throw any light on the situation.

I, myself, believe that the question now raised neither conforms to the intent of Congress, the meaning of the wording of the Act or the long accepted construction of the Section.

Sincerely yours,
Ligon Johnson"

It should be observed that, consistent with Mr. DeWolf's "then" personal opinion in the matter, the Copyright Office, at that time and since, did and does accept renewal applications from anyone named in § 24 without attempting to decide disputes as between them. The resolution of all such disputes should properly be left to the courts, as in the case at bar. Certainly, the acceptance of a renewal claim should not be deemed to confer any beneficial interest on the person obtaining it merely by reason of its issuance—especially in view of the present tendency of the courts to treat one who erroneously makes a claim to ownership as a trustee holding his naked legal title in trust for the true owner.

This case involves a construction of the copyright law, which is intended primarily to benefit authors as a means of encouraging them. Authors have uniformly understood, and the 1909 Act should be so interpreted, that their widows will not be placed at the mercy of children who wish to embroil them in litigation and impair their ability to effectively market the works of their deceased husbands. Moreover, if, in the last years of the original term of copyright, the author continues to have the possibility of progeny, he will be unable to market his works through channels such as motion pictures or other media which require a great investment. And even as to existing children—if they are minors he will be required to have a guardian appointed to approve the sale of their renewal rights, and part of the purchase price will have to be set aside until they reach majority. This would seriously interfere with the free flow of literary and musical works and would impede, rather than promote, the objects of the copyright clause of the Constitution (art. 1 § 8) and the enactments thereunder.

POINT III

EXCLUSIVITY IN COPYRIGHTS ENHANCES AND MAINTAINS THEIR VALUE.

Respondent attempts to create the impression that one of the purposes of the renewal copyright provision was to enable the owners of the renewal term to divide or "split" the renewal copyright among two or more publishers and that there presently is a trend in that direction. To substantiate this contention respondent sets forth (Res. Br. pp. 28-29) the title of seventeen musical compositions which are presently in their renewal term, and the copyright of each of which has been "split" among two or more publishers.

Among these seventeen musical compositions there is not one in which the respective rights of widows and children are involved. All of these seventeen musical compositions involve assignments by original collaborating composers, or where one of them had died, by his widow, or in cases where there was no widow, by his children, or where there were no children, by his next of kin.

These musical compositions are not representative of musical compositions in general, nor do they indicate any general practice or trend. During *each* of the past ten years upwards of ten thousand copyrights were renewed. A great many of such renewal copyrights covered musical compositions which were assigned to publishers. As against these seventeen songs, in which renewal copyrights have been split, the records of the Copyright Office will show tens of thousands of copyright renewal registrations and assignments where the renewals were not split, but were assigned to a single publisher.

The value of the work during the renewal copyright term depends just as much upon exclusivity as it does in the

first or original term. Respondent's contention that there is generally economic benefit in having more than one publisher in the renewal term is fallacious. Musical compositions such as are involved in the instant case are best exploited when they are owned by a single publisher.

Since the death of George G. DeSylva the copyrights of 199 musical compositions written by him already have been renewed. (See p. 29 of brief of Music Publishers' Protective Association, Inc., *amicus curiae*.)

Many of these musical compositions were written by Mr. DeSylva in collaboration with very prominent composers, such as George Gershwin, Walter Donaldson, Victor Herbert, Jerome Kern, Emmerich Kalman, Ray Henderson, Lew Brown, Ira Gershwin, Al Jolson, and Richard Whiting.

Without exception these prominent and experienced composers and petitioner herein have recognized the advantage of having an exclusive publisher and have already assigned their renewal rights to certain particular publishers. (Appendices B through G attached to brief of Music Publishers' Protective Association, Inc., *amicus curiae*.)

The unity of interest which has been preserved thus far is now being seriously threatened by reason of respondent's attempted fragmentation.

The correctness of this practice is more obvious when it is applied to other types of work such as books, plays and dramatic works. The splitting of a copyright in a book or play among two or more motion picture producers, for instance, would render it valueless because neither owner would make the investment necessary to produce a motion picture based upon it.

Respondent argues (Res. Br. p. 30) that in the case at bar the child receives for his partial interest the sum of \$100,000 "plus everything else that would have been received by Mr. and Mrs. DeSylva and more", and respondent concludes that the recovering of this investment would be

an incentive to the second publisher to exploit the properties. This is not true. A reading of the agreement made by the second publisher with respondent, Appendix H, annexed to brief amicus curiae of Music Publishers' Protective Association, Inc., shows that the \$100,000 is an advance and *only* chargeable against performance fees to be received by the second publisher from the American Society of Composers, Authors and Publishers. It is not an advance nor chargeable against royalties which might become payable to respondent by reason of publication, or the licensing of phonograph records or uses in motion picture or other similar means of "exposure". The \$100,000 payment clearly is not calculated to induce the second publisher to expose the work to the public. The sums paid by the American Society of Composers, Authors and Publishers out of its general publishers' performance fund will be paid by reason of performances for profit of the compositions such as radio and television broadcasts.

In fact, it is almost an arithmetical certainty that the second publisher will recoup his investment within a definite period of time which actually can be computed on the basis of the regular quarter annual distributions made by the American Society of Composers, Authors and Publishers to its members, and to recoup this investment the second publisher need not print a single copy nor procure a single phonograph record of any of the songs involved or expose them in any other way.

POINT IV

**EXCLUSIVITY IS TO THE ADVANTAGE OF BOTH
AUTHOR AND PUBLISHER.**

Respondent has attempted to create an issue between authors and composers on the one hand and publishers and assignees on the other hand as to the reason for the provision for the second term of copyright. (Res. Br. p. 7)

To substantiate this so-called issue between authors and publishers respondent has referred to the industry accepted form of contract between authors and publishers established by Songwriters Protective Association, which provides that at the expiration of the original term of copyright, all rights and benefits revert to the author. (Res. Br. p. 31 n. 30)

The contract thus referred to makes no reference to the family of the author. It merely provides that after the first term of copyright the work shall revert to the author. The purpose of this reversion is to enable the author, if he is dissatisfied with the first publisher, and the merit of the work warrants it, to enter into new arrangements on better terms. There is nothing in this contract to indicate that the assignment of the renewal term should not be made to a single publisher, and as a matter of fact it is the general industry practice for collaborating authors and composers to assign their work in the second or renewal copyright term to a single publisher, whether he be the original publisher or a new publisher. In fact as heretofore stated all musical compositions in which George G. DeSylva collaborated with composers have been assigned for both the original and renewal term of copyright to a single publisher.

Obviously, a composer is in a position to demand a higher price for his renewal rights from a publisher if he is able to convey such rights exclusively for the simple reason that he has more to sell. Likewise, a publisher is willing to pay a

higher price for the exclusive renewal rights of a composer because he is obtaining more for his money and will be protected in his exploitation and sale of the properties and compositions assigned.

Dated: New York, N. Y., April 23, 1956.

Respectfully submitted,

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